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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION, *Petitioners,*

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT	5
REASONS FOR GRANTING THE WRIT	14
CONCLUSION	31

TABLE OF CITATIONS

CASES:

Aerojet-General Corp. v. *Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975) 25
Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227 (1937) 16
American Servicemen's Union v. *Mitchell*, 54 F.R.D. 14 (D.D.C. 1972) 28
Baker v. *Carr*, 369 U.S. 186 (1962) 16
Cherokee Nation v. *Hitchcock*, 187 U.S. 294 (1902) ... 24
Chrysler Corp. v. *Brown, et al.*, No. 77-922 (argued Nov. 8, 1978), 47 U.S.L.W. 3330 15
Colorado River Water Conservation District v. *United States*, 424 U.S. 800 (1976) 29
Consolidated Edison Co. v. *NLRB*, 305 U.S. 197 (1938) 26
Edwards v. *Schlesinger*, 377 F. Supp. 1091 (D.D.C.), *rev'd on other grounds sub nom. Waldie* v. *Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974) 28
Gonzales v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973) 28
GTE Sylvania, Inc. v. *Consumer Product Safety Commission*, 404 F. Supp. 352 (D. Del. 1975) 8-9
GTE Sylvania, Inc. v. *Consumer Product Safety Commission*, 438 F. Supp. 208 (D. Del. 1977) 10
GTE Sylvania, Inc. v. *Consumer Product Safety Commission*, 443 F. Supp. 1152 (D. Del. 1977) 9

Page

Juidice v. *Vail*, 430 U.S. 327 (1977) 16
Kerotest Manufacturing Co. v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952) 28, 29
Lapin v. *Shulton, Inc.*, 333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964) 29-30
Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 19
Mann Manufacturing, Inc. v. *Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971) 30
Maryland Casualty Co. v. *Pacific Coal & Oil Co.*, 312 U.S. 270 (1941) 16
Moore v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971) (per curiam) 6, 16-17
National Licorice Co. v. *NLRB*, 309 U.S. 350 (1940) .. 26
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 16
Parklane Hosiery Co. v. *Shore*, —— U.S. ——, 99 S.Ct. 645 (1979) 26
Pepsico, Inc. v. *FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973) 26
Pharmaceutical Manufacturers Association v. *Food and Drug Administration, et al.*, C.A. No. 77-291 (D. Del.) 23
Pierce & Stevens Chemical Corp. v. *Consumer Product Safety Commission*, —— F.2d ——, No. 78-6135 (2d Cir. December 14, 1978) 19
Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102 (1968) 21, 24
St. Louis Amusement Co. v. *Paramount Pictures, Inc.*, 61 F. Supp. 854 (E.D. Mo.), *appeal dismissed*, 326 U.S. 680 (1945), *aff'd on other grounds*, 168 F.2d 988 (8th Cir. 1948) 30
Southwest Airlines Co. v. *Texas International Airlines*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) 25
Steelman v. *All Continent Corp.*, 301 U.S. 278 (1937) .. 29
Torquay Corp. v. *Radio Corp. of America*, 2 F. Supp. 841 (S.D.N.Y. 1932) 29, 30
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 16
United States v. *Citizens National Trust & Savings Bank*, 166 F. Supp. 410 (S.D. Cal. 1958), *aff'd*, 270 F.2d 128 (9th Cir. 1959) 30
Velsicol Chemical Corp. v. *Monsanto Co.*, 579 F.2d 1038 (7th Cir. 1978) 30

Page

STATUTES:

United States Constitution, Article III, Section 2 ..4, 15, 16
Consumer Product Safety Act, 15 U.S.C. § 2051 *et. seq.* (1976) 25
Section 6, 15 U.S.C. § 2055 8
Freedom of Information Act, 5 U.S.C. § 552 (1976) .....*passim*
18 U.S.C. § 1905 (1976) 8
28 U.S.C. § 1254(1) (1976) 2
28 U.S.C. § 1391(e) (1976), P.L. 87-748, 76 Stat. 744 (1962) 22
Rule 19, FED. R. CIV. P. 10, 24, 26
Rule 23, FED. R. CIV. P. 28

MISCELLANEOUS:

S. REP. No. 1992, 87th Cong., 2d Sess. (1962) 22
7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1760 (1972) 28

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on December 22, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals (A.1-A.24) of which review is sought has not yet been reported. The original opinion and judgment of the Court of Appeals (A.44-A.59), which this Court summarily vacated on granting certiorari (A.64), 434 U.S. 1030 (1978), is reported at 561 F.2d 349, *reh. denied,* 565 F.2d 721 (D.C. Cir. 1977) (per curiam). The opinion of the United States District Court for the District of Columbia (A.32-A.42) is reported at 400 F. Supp. 848 (D.D.C. 1975).

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1978, and this petition for certiorari is being filed within 90 days of that date. On January 23, 1979, the Court of Appeals granted a stay of its mandate to and including February 12, 1979 pending the filing of petitions for certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976). Jurisdiction in the District Court was based on the Freedom of Information Act, 5 U.S.C. § 552 (1976).

QUESTIONS PRESENTED

(1) Does an action initiated pursuant to the Freedom of Information Act ("FOIA") to compel release of information present the constitutionally required "case" or "controversy" where the plaintiffs and the governmental agency against which the action is brought desire precisely the same result, namely release to the plaintiffs of the information which the plaintiffs seek, and where the defendant agency has not released the information solely because it has been permanently enjoined from doing so by another federal district court in separate litigation instituted against it by the suppliers of the information?

(2) Has a governmental agency "improperly withheld" information within the meaning of the FOIA (5 U.S.C. § 552(a)(4)(B)) where the defendant agency has not released the information sought by the plaintiffs solely because it has been permanently enjoined from doing so by another district court?

(3) Are two sophisticated requesters of information under the FOIA precluded from prosecuting an FOIA action to compel a governmental agency to release information where another district court has permanently enjoined the agency from publicly releasing the information and where the requesters purposely bypassed ample opportunities to intervene in the other district court?

(4) Is the Consumer Product Safety Commission—an agency charged with informing the public of consumer product safety hazards—as a matter of law an inadequate representative in a "reverse-FOIA" action of the interests of FOIA requesters, so that a permanent injunction entered in that action forbidding the Commission from disclosing specified information does not preclude the requesters who chose not to intervene from later prosecuting, in another district court, an FOIA action to compel the Commission to disclose the specified information?

(5) Has the Court of Appeals for the District of Columbia Circuit erred in setting its own district court on a collision course with a district court in another circuit by (a) directing its own district court to determine whether an agency should be compelled to release certain information under the FOIA when the district court in the other circuit has permanently enjoined the agency from releasing the information and (b) suggesting to its district court that it may enjoin the enforcement of the permanent injunction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of Article III of the United States Constitution provides in relevant part as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizen of another State;—between Citizens of different States. . . ."

The Freedom of Information Act, 5 U.S.C. § 552, provides in relevant part as follows:

> "(a)(3) . . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> . . .
>
> "(a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. . . ."

STATEMENT

Less than thirteen months after this Court summarily vacated in this action an earlier decision of the United States Court of Appeals for the District of Columbia Circuit petitioners are constrained to seek review of a second decision of the Court of Appeals. Once again that Court has remanded this action to the United States District Court for the District of Columbia for determination of whether certain information obtained by the Consumer Product Safety Commission ("CPSC") from the petitioners should be disclosed to plaintiffs-respondents Consumers Union of the United States, Inc. and Public Citizen's Health Research Group (collectively "the requesters") pursuant to the Freedom of Information Act ("FOIA"), even though the United States District Court for the District of Delaware has permanently enjoined such disclosure.

More particularly, just over a year ago, this Court remanded this case "for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware . . ." (A.64). 434 U.S. 1030 (1978). That permanent injunction, entered in a "reverse-FOIA" case instituted against the CPSC by petitioners, prohibits the CPSC from disclosing to any member of the public the very information sought by the requesters in this case. Following this Court's remand, the Court of Appeals reconsidered the matter but now has reaffirmed its prior decision directing its District Court to decide the merits of the requesters' FOIA action, *i.e.*, whether the CPSC should disclose the information to them, notwithstanding the final injunction entered in the Delaware litigation. Significantly, the Court

went on to suggest that its District Court consider enjoining petitioners from enforcing the Delaware injunction if it reaches a conclusion contrary to that reached by the Delaware Court. It thus is apparent that the Court of Appeals views the final injunction entered in the Delaware litigation as virtually meaningless.

In reaching its decision, the Court of Appeals disagreed with its District Court, which originally dismissed this action because there was no "case" or "controversy" between the parties, since the plaintiff requesters and the defendant CPSC both desired the same result, *i.e.,* release of the information, and the CPSC had refrained from releasing the information to the requesters only because of outstanding orders in the Delaware litigation. The Court of Appeals' reversal of this ruling does violence to the "case" or "controversy" requirement of the United States Constitution, is squarely contrary to decisions of this Court, *e.g., Moore* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 47, 48 (1971) (per curiam), and should not be permitted to stand.

The Court of Appeals' decision also flies in the face of the FOIA itself, which only authorizes suits to obtain information being "improperly withheld" by the agency involved. Surely, refusing to disclose information because of a court order prohibiting disclosure of the information is not improper.

Moreover, in ordering the District of Columbia to forge ahead on a collision course with the District of Delaware, the Court of Appeals ran roughshod over established principles of comity and the finality of judgments of coordinate federal courts. Its decision

to permit the requesters to pursue their own FOIA action, despite their timely notice of and deliberate refusal to participate in the Delaware proceedings, ignores the lengthy and hard-fought battle that has already taken place between petitioners arguing against disclosure of the information and the CPSC arguing for its purported right to release the information and the purported right of the public, including the requesters, to obtain it. The decision will force petitioners to relitigate in the District of Columbia the dispute they finally have won in Delaware and creates for the CPSC the potential dilemma of facing two conflicting injunctions of different federal courts, one prohibiting and the other requiring release of the very same information. These are results that should not be countenanced by this Court.

The Court of Appeals' decision is of particular significance because of its impact on other FOIA and reverse-FOIA litigation. If upheld, the essential holding of this case—that those requesting information from a governmental agency under the FOIA are never bound by an order enjoining the agency from releasing the information unless they were parties to the reverse-FOIA case in which the injunction was entered —will render meaningless reverse-FOIA proceedings because of the impossibility of joining all actual and potential FOIA requesters in reverse-FOIA proceedings. The decision thus not only is erroneous but is of far-reaching impact and raises crucial questions meriting review by this Court.

The procedural history of this matter is complex, involving lengthy proceedings in two different federal district courts and two reviews by the Court of Appeals for the District of Columbia Circuit. Upon learn-

ing in April 1975 of the CPSC's final determination to release their submissions to the requesters purportedly pursuant to the FOIA, the manufacturers immediately brought suit in various federal judicial districts against the CPSC to enjoin the threatened disclosure on the grounds that such release was barred, *inter alia,* by exemptions to the FOIA, 5 U.S.C. § 552 (b) (1976); by Section 6 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2055 (1976); and by a provision of the Criminal Code, 18 U.S.C. § 1905 (1976). The actions ultimately were consolidated before Chief Judge Latchum in the District of Delaware, most of them having been brought in that district and the actions filed elsewhere having been transferred there at the request of the CPSC.

Temporary restraining orders prohibiting the disclosure of the information *pendente lite* were entered shortly after commencement of the manufacturers' actions. Then, on October 23, 1975, after extensive briefing and argument, Judge Latchum preliminarily enjoined the CPSC from disclosing the information "in any manner" pending further order of the Court on the ground that Section 6(b)(1)[1] of the CPSA prohibited disclosure (A.71-A.107). *GTE Sylvania, Inc.* v.

[1] This provision reads in relevant part:

> "The [CPSC] shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of [a] manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this [Act]."

Judge Latchum found that the CPSC had deliberately subpoenaed unverified and inaccurate information, disclosure of which would be misleading to the public and unfair to the manufacturers (A.98-A.104).

Consumer Product Safety Commission, 404 F. Supp. 352 (D. Del. 1975). The preliminary injunction remained in effect until December 8, 1977, when, after further briefing and argument, Judge Latchum granted the manufacturers' motions for summary judgment and permanently enjoined disclosure of the information at issue (A.118-A.138; A.139-A.141). 443 F. Supp. 1152 (D. Del. 1977). The CPSC has appealed from Judge Latchum's permanent injunction (A.139-A.141) and the case is now pending in the United States Court of Appeals for the Third Circuit. Oral argument was held on January 8, 1979 and the case is under advisement.

Subsequent to the commencement of the manufacturers' actions and the entry of temporary restraining orders, the requesters instituted the instant action in the District of Columbia under the FOIA to compel the CPSC to release the accident information which had been submitted by the manufacturers and which was, as the requesters acknowledged in their complaint,[2] the subject of the Delaware litigation. On September 23, 1975, the United States District Court for the District of Columbia granted defendants' motions to dismiss the requesters' action on the grounds that (1) the complaint sought no relief against the television manufacturers and (2) there was no justiciable "case" or "controversy" between the requesters and the CPSC, since those parties agreed that the information at issue should be released to the requesters and thus were not true adversaries (A.32-A.42). *Consumers Union of the United States, Inc.* v. *Consumer Product Safety Commission,* 400 F. Supp. 848, 851 (D.D.C. 1975). In dismissing the complaint, Judge Richey ruled that he

[2] *See* Para. 10 of the complaint (A.25-A.31, at A.29).

should not re-examine or countermand the temporary restraining orders entered in the Delaware litigation, which had been issued by a court of competent jurisdiction concurrent with that of his own (A.39-A.40). Judge Richey also explicitly noted the appropriateness of intervention by the requesters in the Delaware litigation (A.42). Rather than pursue this course, however, the requesters remained aloof from the proceedings in Delaware[3] and appealed the dismissal of their complaint to the United States Court of Appeals for the District of Columbia Circuit.

On July 5, 1977, the Court of Appeals (opinion by Wright, J. for a panel consisting of himself and Bazelon, C.J. and Robinson, J.) reversed Judge Richey's holding that there was no "case" or "controversy" and remanded the case with instructions for him to proceed promptly to determine "quite simply, whether

[3] The requesters are participating in the appeal from the Delaware injunction as *amici curiae* asserting that they were necessary or indispensable parties to the District Court proceedings under Rule 19 of the Federal Rules of Civil Procedure. They have asked the Third Circuit to vacate Judge Latchum's permanent injunction and to instruct the District Court either to dismiss the action or to transfer the litigation to the District of Columbia where they may be joined and where their own action is pending. While the requesters argued both in their briefs and in oral argument before the Third Circuit that they cannot be bound by the Delaware injunction since they were not parties to the proceedings which led to the injunction, they studiously avoided many invitations to intervene in the Delaware proceedings on the merits, including an invitation extended by Judge Latchum on September 15, 1977 in denying the CPSC's motion to transfer the Delaware cases to the District of Columbia (A.109-A.117, at A.112 n.9, A.114), 438 F. Supp. 208, 211 n.9, 212 (D. Del. 1977), and numerous invitations from the manufacturers. Nor did the requesters ever attempt to present to Judge Latchum the Rule 19 issue they now are pressing as *amici* on the CPSC's appeal from the Delaware injunction—whether by intervening, appearing as *amici*, or requesting the CPSC to raise the issue on their behalf.

or not the documents should in fact be disclosed" (A.44-A.59, at A.58). 561 F.2d 349 (D.C. Cir. 1977). The Court perceived the necessary "case" or "controversy" to exist in (1) a supposed disagreement between the requesters and the CPSC over whether the then outstanding preliminary injunction entered by Judge Latchum "unequivocally preclude[d]" the CPSC from providing the requesters with the information in question and (2) the Court of Appeals' suspicion that the CPSC did not really want to release the information because, in the Court's view, the CPSC's early conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [the requesters'] argument that the requested documents should be disclosed" (A.53). The Court erroneously concluded that, in any event, the Delaware litigation had been abandoned and that the preliminary injunction was "dead" (A.57).[4] The Court also held that even if the preliminary injunction were still in existence, it could not be given preemptive effect because no private party re-

[4] In fact, the preliminary injunction was very much "alive." On August 20, 1976, the Delaware court had issued a "minute order" instructing the clerk "to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes" (A.108). The minute order provided:

> "Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necesary or desirable, any party may initiate in the same manner as if this order had not been entered." (A.108)

It was clear to all of the parties in the Delaware cases that the preliminary injunction remained in effect even after entry of the minute order and it was equally clear to Judge Latchum. Indeed, at a conference held on July 11, 1977, Judge Latchum specifically stated that the minute order "didn't dispose of the case" and "didn't dismiss the action" and that "the preliminary injunction . . . remains outstanding."

questing disclosure of the information had participated in the Delaware proceedings and, in the Court's view, the CPSC had not adequately represented the pro-disclosure position (A.58). Petitions for rehearing, together with suggestions for rehearing *en banc,* were denied (A.60-A.63), 565 F.2d 721 (D.C. Cir. 1977) (per curiam), but the Court of Appeals' mandate was stayed to allow the manufacturers to file a petition for a writ of certiorari.

On December 8, 1977, after the petition for writ of certiorari was filed, Judge Latchum issued the permanent injunction prohibiting release of the information at issue (A.139-A.141). This fact was promptly brought to the attention of this Court. On January 16, 1978, this Court granted the petition, summarily vacated the Court of Appeals' judgment, and remanded the case to the Court of Appeals "for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware . . ." (A.64). 434 U.S. 1030 (1978). On remand to the Court of Appeals, the requesters and the manufacturers both filed motions in January 1978 requesting a briefing schedule (A.65-A.69). However, no action was taken by the Court until September 20, 1978 when the parties were requested to submit memoranda setting forth their views as to the course the Court of Appeals should take in light of the remand by this Court and "to address with particularity the question whether the permanent injunction entered in *GTE Sylvania* v. *Consumer Product Safety Commission,* Civ. No. 75-104 (D. Del. Dec. 8, 1977), bars appellants [the requesters], who were not parties in that case, from litigating in this case their claim that the materials at issue should be disclosed" (A.70).

On December 22, 1978 the Court of Appeals (Robinson, J. for a panel consisting of himself and Wright, C.J. and Bazelon, J.) issued its second opinion and judgment (A.1-A.24), again rejecting all of the manufacturers' arguments and remanding the case to the District Court for determination of whether the information should be disclosed to the requesters (A.23-A.24). The Court expressly adopted its prior position and reasoning that the complaint presented a constitutional "case" or "controversy" notwithstanding the entry of the Delaware permanent injunction (A.10).[5] It then concluded that neither principles of comity nor collateral estoppel barred the prosecution of the requesters' action as the requesters were not formal parties to the Delaware proceedings (A.12-A.16). In reaching this conclusion, the Court held that the CPSC could never represent the interests of FOIA requesters in a reverse-FOIA suit so as to preclude later litigation over the same information (A.12-A.14). Nor, in the Court of Appeals' view, did the requesters' purposeful failure to intervene in the Delaware proceedings preclude their collateral attack on the Delaware judgment, because "[t]o decide otherwise would force [a requester] to accept the choice of a forum possibly sympathetic to the submitter and surely inconvenient or impossible for the requester" (A.22), and since "Congress specified the sites proper for judicial consideration of FOIA claims" (A.22-A.23), "to allow submitters to

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[5] The Court did not address but implicitly also rejected the manufacturers' argument, first raised by the government in its initial brief in the Court of Appeals and later endorsed by the Solicitor General, that the information at issue had not been "improperly withheld" by the CPSC within the meaning of Section 552(a)(4)(B) of the FOIA.

force FOIA litigation to occur in other arenas would free the tail to wag the dog" (A.23). Recognizing that its holding set the District of Columbia Court on a collision course with the Delaware Court (A.16-A.17), the Court of Appeals blamed the CPSC for failing to join the requesters as parties to the Delaware proceedings under Rule 19, Fed. R. Civ. P (A.18-A.19), and claimed that the manufacturers could have avoided the problem by maintaining the Delaware suit as a "defendant class action against the Commission and all possible requesters" (A.17). Accordingly, the Court of Appeals remanded the case to the District Court with instructions to "continue toward a decision on the merits" (A.23) and suggested that its District Court consider enjoining the manufacturers from enforcing their Delaware judgment against the CPSC if the District Court found that the failure to release the information was indeed improper (A.24).

The judgment of the Court of Appeals thus represents no change in position from its prior judgment which this Court summarily vacated on certiorari. As in its prior decision, the Court of Appeals has found a "case" or "controversy" where none exists and has ordered its District Court to proceed to the merits notwithstanding the Delaware permanent injunction. As we show below, this decision, if permitted to stand, will lead to chaos in the judicial administration of FOIA and reverse-FOIA actions, and therefore should be reviewed and reversed by this Court.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals presents crucial questions concerning the proper accommodation of FOIA and "reverse-FOIA" actions, namely, the

existence of the constitutionally requisite "case" or "controversy" between the parties, the proper interpretation of the FOIA where an agency has been enjoined from releasing information sought, and the preclusionary effect on nonparties of a final judgment prohibiting a governmental agency from releasing information sought under the FOIA. These questions—which are not presented by *Chrysler Corp.* v. *Brown, et al.,* No. 77-922 (argued Nov. 8, 1978), 47 U.S.L.W. 3330—are highly significant and in view of the growing volume of FOIA and reverse-FOIA litigation throughout the country are virtually certain to recur. They should be reviewed by this Court in order that subordinate courts may have guidance for the problems which will increasingly confront them.

The decision of the Court of Appeals for the District of Columbia Circuit in this case undermines the "case" or "controversy" requirement of Article III of the Constitution by contriving a disagreement between the parties over the meaning of a crystal clear injunction issued by a district court in another circuit. The decision unnecessarily sets the District of Columbia Court on a collision course with the Delaware District Court by holding (a) that a governmental agency improperly withholds records within the meaning of the FOIA even though the records are withheld solely because a federal court has enjoined release of the records in any manner, (b) that a judgment permanently enjoining release of information does not bar FOIA requesters from maintaining a later action in another court seeking release of the same information where the FOIA requesters purposely chose not to intervene in the first action, and (c) that a govern-

mental agency may never represent the interests of FOIA requesters in a reverse-FOIA action so as to bar later litigation by the requesters seeking release of the same information. Indeed, by asserting that the District of Columbia Court must proceed to the merits of this case and by suggesting that the District of Columbia Court consider enjoining the manufacturers from enforcing their Delaware injunction against the CPSC, the Court of Appeals has challenged the jurisdiction of the Delaware Court to enforce its final judgment.

We believe that the decision of the Court of Appeals raises issues of paramount importance concerning the proper judicial administration of FOIA and reverse-FOIA actions. The decision warrants review, if not summary reversal, by this Court.

1. Under the terms of Article III of the Constitution, a court may act only in actual "cases" or "controversies." *See Juidice* v. *Vail,* 430 U.S. 327, 331 (1977); *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89 (1947); *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227 (1937). There must be a "substantial controversy, between parties having adverse legal interests," *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941), so as to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974), *quoting Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Accordingly, where parties "desire precisely the same result . . . [t]here is . . . no case or controversy within the meaning of Art. III of the Constitution." *Moore* v. *Charlotte-*

Mecklenburg Board of Education, 402 U.S. 47, 48 (1971) (per curiam).

In its December 22, 1978 opinion, the Court of Appeals expressly adopted (A.10) the holding and reasoning of its July 5, 1977 opinion that a justiciable "case" or "controversy" exists between the requesters and the CPSC notwithstanding the fact that the CPSC wants to release the information to the requesters and has made a formal determination to do so (A.52-A.54). The CPSC has always desired precisely the same result as the requesters, and the only reason the information was not released to the requesters is because the CPSC has been prevented from doing so by the restraining orders, preliminary injunction, and permanent injunction entered in the Delware litigation.[6] Thus, on its face, the decision of the Court of Appeals disregards fundamental principles of justiciability.

In its July 5, 1977 opinion the Court of Appeals attempted to circumvent the congruence of interest between the requesters and the CPSC in two ways, neither of which can withstand scrutiny. The Court first perceived a supposed disagreement between the requesters and the CPSC defendants as to whether the orders entered in the Delaware litigation "precluded" or "absolved" the CPSC from providing the requesters with the information they sought (A.52). But not one word in the requesters' complaint or briefs ever has questioned the meaning of any of the orders entered in the Delaware litigation or their binding

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[6] Indeed, as Judge Richey noted (A.39 n.14) in dismissing the District of Columbia action, the CPSC made this very representation in the District of Columbia Court, stating in paragraph 13 of its answer to the complaint that "disclosure will be made as soon as the [CPSC] defendants are not enjoined from doing so."

effect on the CPSC. Certainly, there can now be no disagreement as to whether the permanent injunction [7] now in effect prevents the CPSC from releasing the accident information to the requesters. Clearly it does.

The Court of Appeals also based its finding of a "case" or "controversy" on its perception that the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [the requesters'] argument that the requested documents should be disclosed" (A.53). While the Court stated in its December 22, 1978 opinion that "we earlier rejected one solution—dismissal for absence of a case or controversy—and we adhere to that position for the reasons then stated" (A.10), it later referred to "the temptation—to which we earlier succumbed—to undertake a critique of the agency's litigative strategy" (A.17). We assume that the latter statement implicitly disassociates the Court from its earlier charges against the CPSC. Moreover, it is clear that those charges have no foundation in fact [8] and are inappropriate as a matter of law. As the Court of Appeals itself

[7] Indeed, the December 22, 1978 remand order (A.23-A.24) itself recognizes that there can be no "controversy" as to the effect of the injunction. The remand order merely directs the District of Columbia District Court to resolve the underlying merits of the case before it, to determine whether the information should be released to the requesters, and, in effect, to determine whether the Delaware injunction should have been issued at all (A.23-A.24). The order even suggests that the District of Columbia Court consider enjoining the manufacturers from enforcing the Delaware injunction against the CPSC in the event that the District of Columbia Court decides that the information should be released (A.24).

[8] The petitions for rehearing filed with the Court of Appeals after its July 5, 1977 decision, particularly that of the CPSC, show how totally unjustified the Court of Appeals was in its attack on the CPSC's handling of the Delaware litigation. Of particular note is the Court of Appeals' completely baseless challenge of the CPSC's motives in failing to oppose the temporary restraining orders and its decision to withdraw its appeal from the preliminary injunction. The need for TRO's to prevent the whole matter from becoming moot was so obvious that the entry of such orders by the Delaware Court was certain, and therefore opposition plainly would have been fruitless. Moreover, the CPSC felt it needed additional time fully to brief its position before any preliminary injunction hearing. The decision to withdraw the interlocutory appeal was made by the Solicitor General, who concluded that the appeal would clearly be futile. Nor is the failure of the CPSC to press for prompt final hearing in the Delaware litigation any basis for challenging the bona fides of its expressed desire to release the information. Rather, the decision not to press for entry of a final judgment in Delaware stemmed from the CPSC's hope that a favorable decision would be reached in the case of *Pierce & Stevens Chemical Corp.* v. *Consumer Product Safety Commission*, No. 75-410 (W.D. N.Y.). In fact, the CPSC's litigation strategy appears completely justified because the Second Circuit reversed entry of a permanent injunction against the CPSC and rendered an opinion favorable to the CPSC's position in the Delaware litigation. Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, No. 78-6135 (2d Cir. December 14, 1978). Earlier, the same Court had affirmed by oral opinion, 578 F.2d 1369 (2d Cir. 1978), the issuance of a preliminary injunction in *Pierce & Stevens*. 439 F. Supp. 247 (W.D.N.Y. 1977).

recognized in its July 5, 1977 opinion (A.54 n.27), the litigation strategy of a party, even if incorrect, is simply not a matter for consideration by an appellate court. *See Link* v. *Wabash R.R.*, 370 U.S. 626, 633-34 (1962). In any event, the desire of the CPSC to release the information to the requesters is itself sufficient to establish that there is a lack of adverseness between the parties.

The Court of Appeals' "case" or "controversy" holding sets a dangerous precedent for other courts that, if allowed to stand, will result in a proliferation of litigation. For example, the decision will allow a person to circumvent a federal court's injunctive order against him by arranging for another interested person to bring suit in a different federal court to have the first person ordered to do what he actually desires to do but cannot do without violating the injunction issued in the first court. The decision will also enable any individual who does not like a particular court's order in a litigation to try to bypass the order by starting an action in another court he considers to be more favorably disposed to his position.

2. By ordering the District of Columbia Court to determine whether the accident information should be disclosed, the Court of Appeals implicitly rejected the manufacturers' argument, supported by the Solicitor General in his opposition (p. 5) to the manufacturers' first petition for a writ of certiorari, that the requesters' action could not be maintained because the information at issue was not being "improperly withheld" within the meaning of § 552(a)(4)(B) of the FOIA. Under the FOIA, a district court only "has jurisdiction . . . to order the production of any agency records improperly withheld" and "the burden [of proof] is on the agency to sustain its actions" in withholding the records. 5 U.S.C. § 552(a)(4)(B)(1976).

The CPSC has never claimed that the documents at issue in this litigation are exempt from disclosure pursuant to one of the exemptions to the FOIA. To the contrary, the CPSC has refused to disclose the documents to the requesters only because a court of compe-

tent jurisdiction has enjoined the CPSC from disclosing the documents to the public. The refusal of the CPSC to disobey the Delaware injunction cannot, as a matter of law, constitute improper withholding of documents and, accordingly, the Court of Appeals erred in holding to the contrary. The decision will lead to an unnecessary proliferation of lawsuits and should not be upheld.

3. The Court of Appeals concluded that because the requesters were not formal parties to the Delaware proceedings, the entry of the Delaware permanent injunction did not bar them from proceeding with their District of Columbia action (A.20). In reaching this conclusion, the Court of Appeals recognized (A.22 & n.64) that it had decided an important question expressly reserved by this Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 114 (1968)—*i.e.,* whether a person can "be bound by the previous decision because, although technically a nonparty, he had purposely by-passed an adequate opportunity to intervene." 390 U.S. at 114. The Court of Appeals found that requesters would suffer "undue hardship" if required to intervene in reverse-FOIA proceedings because of what it viewed as a clear Congressional intention to limit "judicial consideration of FOIA claims" to specified districts[9] and its own perception that "to allow submitters to force FOIA litigation to occur in other arenas would free the tail to wag

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[9] 5 U.S.C. § 552(a)(4)(B) provides that an action to compel release of agency records improperly withheld under the FOIA may be brought in "the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia."

the dog" (A.22-A.23). The Court further stated that "[t]o decide otherwise would force [a requester] to accept the choice of a forum possibly sympathetic to the submitter and surely inconvenient or impossible for the requester" (A.22).

The Court of Appeals' concern that the forum chosen by the reverse-FOIA plaintiff may be "sympathetic to the submitter" is speculative. More significantly, however, Congress has provided by statute a choice of forum for plaintiffs in reverse-FOIA and other litigation where the government is a party defendant. Title 28 U.S.C. § 1391(e) (1976) gives a submitter of information a broad choice of venue, including the right to bring suit in the "home court." [10] Yet in its desire to intrude into the Delaware proceedings, the Court of Appeals completely ignored the significant policy of this statutory provision.

The history of this litigation cries out for reversal of the Court of Appeals' decision. The requesters—

[10] Prior to 1963, an action against an agency official normally could only be brought in the District of Columbia—the precise result sought now by the requesters. However, Congress amended the general federal venue statute, 28 U.S.C. § 1391, by adding a subsection (e) permitting a government official to be sued in any judicial district in which (1) the official resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. *See* P.L. 87-748, 76 Stat. 744 (1962). The legislative history of this landmark amendment shows that Congress was concerned about broadening the plaintiff's choice of venue in actions against the government and viewed the then current state of the law—which normally required that suit be brought in the District of Columbia—to be "contrary to the sound and equitable administration of justice." S. Rep. No. 1992, 87th Cong., 2d Sess. (1962).

two sophisticated and litigation oriented consumer groups—had notice [11] of the Delaware litigation almost from the time of its inception and made a deliberate choice [12] not to participate in that litigation and instead to concentrate their efforts on revitalizing their own FOIA action. It was not until after entry of the permanent injunction and appeal to the Third Circuit that the requesters, in a belated attempt to undermine the Delaware proceedings, finally filed a brief as *amici curiae* with the Third Circuit urging that the permanent injunction be vacated for failure to join the requesters as parties to the District Court proceedings

[11] While the Court of Appeals acknowledged that "[p]reclusion based on the failure to intervene would be proper, if at all, only where the putative intervenor had timely notice of the litigation" (A.22 n.64), it proceeded to ignore the *undisputed* fact that the requesters here had such notice.

[12] That choice admittedly was made "for strategic reasons" (A.112 n.9) and not because of any undue hardship. In fact, no claim of hardship could be substantiated here in light of the fact that one of the requesters has sought to intervene in another action pending in the District of Delaware. Pharmaceutical Mfrs. Ass'n v. Food and Drug Administration, *et al.*, C.A. No. 77-291 (D. Del.) (September 23, 1977 Motion for Leave to Intervene as Defendants by Consumers Union of the United States, Inc., *et al.*).

Moreover, while the requesters originally argued before the District of Columbia District Court that the Delaware Court was a "hopelessly inappropriate and inconvenient forum" (*see* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment and In Opposition to Defendants' Motions to Dismiss or In The Alternative for Stay of Proceeding at 45), they later recanted on appeal and conceded that the inconvenience of the Delaware forum "may be minimal." *See* Brief of Plaintiffs-Appellants at 18.

and that the case either be dismissed or transferred to the District of Columbia.[13]

This case thus squarely presents the question expressly reserved by this Court in *Provident Tradesmens Bank* and is worthy of consideration by this Court. If the Court of Appeals' ruling is permitted to stand, an individual with an interest in the outcome of a litigation would be encouraged not to participate in that litigation because he could always institute a later

[13] Incidentally, in an attempt to "accommodat[e]" FOIA and reverse-FOIA suits (A.16), the Court of Appeals for the District of Columbia opined that the CPSC should have urged the Delaware Court to join the requesters as parties under Rule 19, Fed. R. Civ. P., so as to avoid duplicative litigation (A.17-A.20). Indeed, the Court of Appeals went so far as to state, by way of dictum, that the requesters were indispensable parties under Rule 19(b) to the Delaware proceedings and that the failure to join the requesters thus mandated dismissal of the Delaware actions (A.18-A.19). We know of no reverse-FOIA case where the requester has been joined as a party, much less where a court has held that a requester must be joined under Rule 19. The consequences of the Court of Appeals' dictum could be profound. First, every reverse-FOIA case in which a judgment has been entered for the submitter, without intervention of the requester, would be subject to attack. Second, where two requesters reside in different districts, the submitter would be denied a forum or, at the very least, would be forced to bring two lawsuits in order to obtain personal jurisdiction over each requester.

The Court's gratuitous comments concerning Rule 19 were made without the benefit of full briefing or argument, and were without legal foundation. *See* Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902). Rather, the Rule 19 discussion appears to have been calculated to influence the decision of the Third Circuit, where the issue has been fully briefed and argued. In any event, if, as we believe, the requesters are "properly foreclosed by [their] failure to intervene in the [Delaware] litigation, then the joinder issue considered in the Court of Appeals vanishes, for any rights of [the requesters] have been lost by [their] own inaction." Provident Tradesmens Bank v. Patterson, *supra*, 390 U.S. at 114.

suit of his own if the first suit were not resolved to his satisfaction. Having deliberately failed to intervene in the Delaware litigation, despite the absence of any undue hardship in doing so, the requesters should not be permitted to make a collateral attack on an injunction entered as a result of that litigation. To permit the Court of Appeals' decision to stand will render meaningless the concept of final judgments in reverse-FOIA litigation.

4. In finding that the Delaware permanent injunction does not bar the instant action, the Court of Appeals also held that the CPSC may never represent the interests of FOIA requesters in reverse-FOIA actions so as to preclude a later collateral attack on a judgment prohibiting disclosure of the information sought (A.12-A.14). In so ruling, the Court of Appeals brushed aside cases cited by the manufacturers holding that citizens may be bound by litigation where their interests are represented by the government.[14] Instead, the Court reached the startling conclusion that a governmental agency favoring disclosure of information under the FOIA does not have a congruence of interest with FOIA requesters to whom the agency desires to release the information (A.12-A.13).

This holding is particularly egregious in the circumstances of this case. The CPSC is uniquely charged with informing the public of consumer product safety hazards, 15 U.S.C. § 2051 *et seq.* (1976), and has made a conscious choice to maintain a pervasive "openness"

[14] *See* Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84, 98, 101 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977); *see also* Aerojet-General Corp. v. Askew, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975).

policy. The FOIA requesters in this action were given every opportunity to intervene in the Delaware proceedings,[15] but instead chose to stand aloof from those proceedings and to limit their participation to the filing of a brief as *amici curiae* before the Third Circuit urging that the Delaware injunction be vacated for failure to join them as parties. Despite an explicit invitation from the manufacturers, the requesters refused to intervene on appeal from the Delaware injunction and to file a brief on the merits. Rather, twelve days after the FOIA requesters sought permission from the Third Circuit to file their brief on the Rule 19 issue, another consumer group aligned with the interests of the requesters, Consumer Federation of America ("CFA"),[16] moved for leave to file a brief as

[15] Indeed, one court has held, based on its interpretation of National Licorice Co. v. NLRB, 309 U.S. 350 (1940) and Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), that in an agency antitrust proceeding seeking to vindicate public rights against a private party, nonparties with an interest in the proceeding can be bound by the results of that proceeding if they had notice and an opportunity to intervene. Pepsico, Inc. v. FTC, 472 F.2d 179, 187-90 (2d Cir. 1972) (Friendly, J.), *cert. denied*, 414 U.S. 876 (1973). If, as in the *Pepsico* case, a private party can represent the interests of nonparties in an agency antitrust proceeding, surely the government agency also can adequately represent nonparties' interests, so as to bind those nonparties, where the nonparties bypassed an opportunity to intervene. *Compare* Parklane Hosiery Co. v. Shore, —— U.S. ——, 99 S.Ct. 645, 651-52 (1979), where this Court stated that a party's failure to intervene in an earlier proceeding may materially affect that party's right to assert offensive collateral estoppel in a subsequent proceeding.

[16] In its motion for leave to file a brief as *amicus curiae* with the Third Circuit (A.145-A.147), CFA described itself as "the largest consumer organization in the United States" "composed of over 225 national, state, and local consumer organizations" (A.145).

amicus curiae on the merits and was permitted to do so without objection from the manufacturers. Thus, even though the requesters believe that their interests have not been fully represented by the CPSC, it cannot be denied that their views on the merits of the Delaware injunction will be fully and fairly litigated before the Third Circuit through the combined efforts of the CPSC and CFA.

The holding of the Court of Appeals clearly warrants review by this Court because, if the decision is allowed to stand, a submitter of information to the government will never be able to obtain final relief by successfully prosecuting a reverse-FOIA action. Instead, a succession of future requesters could file suits seeking to compel release of the same documents subject to the prior judgment, arguing that none of them is bound by any prior judgment (whether entered in a FOIA action or a reverse-FOIA action) because none of them was a party to the action in which the judgment was entered. Under these circumstances, no one ever could impart sensitive information to a governmental agency with any assurance that it would be economically practicable to defend the confidentiality of the information.[17]

[17] The Court of Appeals claimed that the manufacturers could have achieved finality in the Delaware proceedings by naming the appellants-requesters as representatives of a defendant class consisting of "all possible requesters" (A.17). This contention was made without the benefit of any briefing or argument whatsoever and, in any event, is erroneous. First, a "class" of "all possible requesters" would be comprised of over 200 million persons since any person may at some unspecified future time request the documents at issue. It is clear that "the requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the

5. In setting its own District Court on a collision course with the Delaware Court, the Court of Appeals ignored long-standing principles of comity that mandate dismissal of this action, by (a) directing its own District Court to proceed to redetermine issues already decided by the Delaware Court (A.23-A.24) and (b) suggesting to its District Court that it consider enjoining the manufacturers from enforcing their Delaware injunction against the CPSC (A.24).[18] As we have

court to determine whether a particular individual is a member. This means that the class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated. . . ." 7 Wright & Miller, Federal Practice and Procedure: Civil § 1760 at 581-82 (1972); *see also* Edwards v. Schlesinger, 377 F. Supp. 1091 (D.D.C.), *rev'd on other grounds sub nom.* Waldie v. Schlesinger, 509 F.2d 508 (D.C. Cir. 1974) (denying certification of a class of all "past, present and future" female applicants to the U.S. Air Force Academy because it is "ill-defined" especially as to "future" members); American Servicemen's Union v. Mitchell, 54 F.R.D. 14 (D.D.C. 1972) (denying certification of a class composed of "all American citizens who have, do, or intend to advocate ideas, policies, and political positions which are unpopular, controversial, or who otherwise dissent from the ideas, policies, and political positions predominant in American society"). Second, it is doubtful that the appellants-requesters, much less a class, could be named as defendants, since only the CPSC can provide the relief sought by the manufacturers. Third, it would be impossible to give constructive "notice" to members of the class, because of its immense size, if the court deemed notice necessary to protect the absent members' rights. *See* Rule 23(d), Fed. R. Civ. P. Moreover, joining a defendant class would not ensure finality of the judgment, since it could be subject to collateral attack by an absent member on the ground that the class lacked adequate representation. *See* Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

[18] While we acknowledge that in appropriate circumstances a court first acquiring jurisdiction may enjoin a party before it from proceeding to prosecute a later filed action, Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180 (1952), we have found no support for the Court of Appeals' suggestion that the *second* court acquiring jurisdiction (the District of Columbia Court) can enjoin a party from enforcing a *judgment* obtained in an earlier action. The only case cited by the Court of Appeals supports the former and not the latter proposition. *See* Steelman v. All Continent Corp., 301 U.S. 278 (1937), where the first court acquiring jurisdiction in a bankruptcy matter enjoined a party before it from *attempting* to obtain a judgment in a later filed action.

shown, this deliberate disregard by the Court of Appeals of the jurisdiction of the Delaware Court is totally unnecessary and warrants reversal by this Court. Neither the District of Columbia Court nor the Court of Appeals for the District of Columbia Circuit has any right or power to set aside the Delaware permanent injunction.

The doctrine of comity rests upon considerations of orderly judicial administration, including conservation of judicial resources and comprehensive disposition of litigation. *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 817 (1976). When two federal courts are faced with the prospect of exercising concurrent jurisdiction over a controversy, "the general principle is to avoid duplicative litigation." *Id. See also Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.,* 342 U.S. 180 (1952).

Considerations of comity are especially important where, as here, an injunction has been entered by the first court considering the matter. Courts are particularly wary of interfering with injunctive relief fashioned by another court. *E.g., Torquay Corp.* v. *Radio Corp. of America,* 2 F. Supp. 841 (S.D.N.Y. 1932), cited with approval in *Lapin* v. *Shulton, Inc.,* 333 F.2d

169 (9th Cir.), *cert. denied,* 379 U.S. 904 (1964); *St. Louis Amusement Co.* v. *Paramount Pictures, Inc.,* 61 F. Supp. 854, 857 (E.D. Mo.), *appeal dismissed,* 326 U.S. 680 (1945), *aff'd on other grounds,* 168 F.2d 988 (8th Cir. 1948); *see also Mann Manufacturing, Inc.* v. *Hortex, Inc.,* 439 F.2d 403 (5th Cir. 1971); *Velsicol Chemical Corp.* v. *Monsanto Co.,* 579 F.2d 1038, 1050 n.19 (7th Cir. 1978). Nor does the applicability of the doctrine depend upon whether all of the parties to the second suit were parties to the original action. *E.g., United States* v. *Citizens National Trust & Savings Bank,* 166 F. Supp. 410, 412 (S.D. Cal. 1958), *aff'd,* 270 F.2d 128 (9th Cir. 1959); *Torquay Corp.* v. *Radio Corp. of America, supra.*

These principles demonstrate that one federal district court should not be permitted to interfere with an injunction entered by another federal court. Yet, this is precisely what the Court of Appeals decision contemplates.[19] The fact that the plaintiff requesters in this action were not parties to the Delaware litigation is irrelevant since the CPSC was a party, is bound by the Delaware Court's injunction, and cannot disregard it. If the plaintiff requesters wish to persist in their efforts to obtain the documents, their remedy is to take action in the Delaware Court to challenge or seek

[19] Indeed, the Solicitor General, in his opposition (p. 6) to the manufacturers' original petition for a writ of certiorari, stated that in light of the Delaware permanent injunction, "principles of comity should in our view preclude the District of Columbia court from proceeding with this litigation." However, the Solicitor General opposed review at that time because of his sanguine belief that entry of the permanent injunction constituted a "change in circumstances" which surely would be considered by the courts below. Unfortunately, the Solicitor General's views were in effect rejected by the Court of Appeals.

modification of the injunction. Proceedings in the District of Columbia Court whose sole objective is a ruling and order directly contrary to the Delaware Court's ruling and permanent injunction are totally unwarranted and cannot be permitted by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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